IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his Capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiffs,	)	
v.	)	Case No. 05-CV-329-TCK-SAJ
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

MOTION OF DEFENDANT SIMMONS FOODS, INC. TO COMPEL DISCOVERY FROM PLAINTIFF AND SUPPORTING BRIEF

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MOTION OF DEFENDANT SIMMONS FOODS, INC. TO COMPEL DISCOVERY FROM PLAINTIFF AND SUPPORTING BRIEF

Defendant Simmons Foods, Inc. ("Simmons") hereby moves the Court for an order compelling Plaintiff to properly answer Simmons' First Set of Interrogatories and First Request for Production of Documents. Simmons asked the Plaintiff a short series of simple, straightforward, factual questions. In return, Simmons received blanket objections and a complete failure to answer a single question or produce a single

document. Requests to Plaintiff by email and letter have not succeeded in convincing Plaintiff to cooperate in discovery. So, Simmons comes to the Court for relief.

Introduction

As the Court is well aware by now, Plaintiff alleges that waters and other elements of the Illinois River Watershed have been degraded by acts for which Defendants, including Simmons, are liable to the tune of millions of dollars. Plaintiff has taken the position that its testing and sampling work have already confirmed injury to the watershed from litter application. *See, for example,* Plaintiff's Motion for Leave to Conduct Limited Expedited Discovery, Dkt. No. 210.

Plaintiff has been perfectly willing to discuss nutrient loading with the press, while now trying to withhold that information from Simmons. As one example, Simmons attaches as Exhibit 1 a January 23, 2005 Tulsa World article interviewing the Attorney General. There, Plaintiff's representative was happy to discuss allegations and cite figures. Some illustrative excerpts are set out below:

> The AG's staff contends the amount of poultry-generated phosphorus flowing into the Illinois River/Lake Tenkiller watershed alone is equal to the phosphorus that would be generated 'by an additional 10.7 million people living in the watershed without waste-water treatment'…Edmondson's office calculated that 58 percent of the phosphorus flowing into Lake Tenkiller comes from runoff, and 95 percent of that phosphorus comes from poultry litter."

Since Plaintiff presumably had some good faith basis for its allegations against the Defendants that they have befouled the watershed, Simmons posed five simple questions and one document request. The questions were, tell us for certain years how much phosphorus ("P") and nitrogen ("N") loading the State says occurred in Lake Tenkiller caused by the land application of poultry litter, tell us how much came from

growers under contract with Simmons, tell us how you know this, and finally identify anyone the State says was medically harmed by contact with the supposedly polluted water. The one document request asked the State for whatever reports or studies were the basis for the State's figures for P and N loading of Lake Tenkiller.

The State declined to answer any of the interrogatories or produce any documents. Instead, the State, which has been happy to discuss allegations about phosphorus runoff in the press, argued that the facts are secret matters of privilege or attorney work product, or alternatively are not secret and have been or will be produced in unidentified business records. Neither of those positions withstands any scrutiny. The ultimate answer, more likely, is that the State has no clue how much, if any, P or N loading occurred in Lake Tenkiller as a result of the land application of poultry litter. If that is the answer, Simmons is entitled to the answer.

Simmons will address each of its interrogatories and the document request. In accordance with Local Rule 37.2(d), copies of the discovery requests and the State's responses (with its associated privilege log) are Exhibits 2 and 3 to this motion. At the end Simmons will address the "general objections" posed by the State, which might be serving as some secret unilateral limitation on what the State is willing to disclose.

The Specific Objections

Interrogatory No. 1

Interrogatory No. 1 asks Plaintiff a straightforward, factual question: "For each calendar year, 1985 through 2005, state the total P loading for that year to Lake Tenkiller resulting from the land application of poultry litter in the Illinois River Watershed." The appropriate answer is either (i) a particular amount for each year Plaintiff contends to be

the true facts, or (ii) a candid admission Plaintiff does not know. Instead, Plaintiff responded with about two pages of objections.

The objections appear to break down into two general categories. The first category is the theory that a question of fact is immune from discovery as privileged or work product. Plaintiff objects that the fact being inquired about is information known or opinions held by expert consultants or by Plaintiff's lawyers. Plaintiff represents the fact can only be disclosed much later in the case, after the Court sets dates for the disclosure of expert witnesses or sets a trial date. Plaintiff also puts forth the theory that the fact (the amount of P loading to Lake Tenkiller from the land application of poultry litter) is a document or tangible thing prepared in anticipation of litigation.[1] Oddly, Plaintiff refers to and attaches a telegraphic privilege log which lists various items authored by nonlawyers, none of which is tied in any way to the request.

The interrogatory did not ask Plaintiff to identify each expert, consultant or lawyer who knows the amount of P loading. The interrogatory did not ask Plaintiff for any secret tangible materials or documents reflecting the amount of P loading. The interrogatory did not ask Plaintiff what its lawyers have said to each other about the amount of P loading. The interrogatory just asked Plaintiff to state the amount. And Plaintiff either has an amount it can identify, or it does not. If Plaintiff has an amount, that is no secret and it should answer the interrogatory. If Plaintiff does not know the answer, it can just tell Simmons.

[1] Plaintiff specifically objects to this interrogatory "on the grounds that it improperly seeks identification of 'all' items of responsive information, which renders it overly broad, oppressive, unduly burdensome and expensive to answer." Since the request does not even use the word "all," Simmons can only assume this objection appears in the responses by mistake.

The other area of objection is Plaintiff's objection to the interrogatory "to the extent this information has already been provided to the Poultry Integrator Defendants in responses to previous interrogatories and/or in response to one or more Open Records Requests made by one or more of the Poultry Integrator Defendants." The State does not identify any particular materials which answer the interrogatory.

Plaintiff finally assays some actual response to the interrogatory, but it turns out not to be any response at all: "Subject to and without waiving its general or specific objections, and pursuant to Fed R. Civ. P. 33(d), information sought in this Interrogatory, and whose production is not objected to herein, may be found within the business records being provided to this Defendant. Identification of such business records will occur on a rolling basis as the State's review of its business records proceeds." Simmons waited to see if the State would actually come through on the last representation and identify some papers containing the answer to the simple question.

Instead, Simmons received a June 30 letter from Mr. Nance for Plaintiff transmitting indices of documents which were supposed to be responsive to the interrogatories and document request. Simmons dutifully reviewed the indices, discovering it was just a listing of various general information available from websites and a table stating to which requests the general information was "potentially responsive." A copy of Mr. Nance's letter with the attachments is Exhibit 4 hereto.

Plaintiff objected that the simple piece of factual information being requested is a secret held by its lawyers or experts, not disclosable until shortly before trial, but also that the answer is contained in unspecified business records already provided or to be provided at some unspecified time in the future. Plaintiff cannot have it both ways. In

fact, Plaintiff cannot have it either way. A fact is not immune from discovery because a lawyer or a consultant happens to know it. And a party using FRCP 33(d) must specify which business records contain the requested information. A promise that the answer lies somewhere in unspecified materials already produced or yet to be produced is insufficient.

Interrogatory No. 2

Interrogatory No. 2 is quite similar to the first interrogatory. It asks another simple factual question: "For each calendar year, 1985 through 2005, state the total N loading for that year to Lake Tenkiller resulting from the land application of poultry litter in the Illinois River Watershed." The objections and refusals to answer this interrogatory are identical to those relied on in refusing to answer Interrogatory No. 1, except that the objection about the use of "all" is absent.

The problems with the objection and refusal to answer are identical. Plaintiff has sued Simmons for millions of dollars, claiming Simmons is responsible for changes in the water chemistry of various areas, including Lake Tenkiller, resulting from the land application of poultry litter in the Illinois River Watershed. Presumably, Plaintiff has something to back up those allegations. Simmons is asking what amount of N loading Plaintiff contends resulted in each of specific years. Plaintiff may be objecting and refusing to answer because it has no answer. If the answer is "Plaintiff doesn't know," then Simmons is entitled to that answer.

Interrogatory No. 3

Interrogatory No. 3 is based on the answers to the first two interrogatories. Interrogatory No. 3 asks: "For each of your answers to Interrogatory Numbers One and

Two, state the amounts which came from poultry growers under contract with Simmons Foods, Inc." Most of the objections are the same as those of the first two interrogatories. Plaintiff objects that the amount coming from growers under contract with Simmons is secret, privileged information or secret work product documents, which Plaintiff will not disclose until expert report time shortly before trial.

Plaintiff also raises the new objection - under its legal theory, all Defendants are jointly and severally liable and so Plaintiff does not have to tell Simmons how much chemical loading it contends came from growers under contract with Simmons.

> Under the State's CERCLA and common law claims the liability of the Poultry Integrator Defendants in this action is joint and several, and it is the responsibility of the Poultry Integrator Defendants to meet the heavy burden of showing the injury is divisible (if that can be shown at all). Indeed, the State has asserted that the injury is indivisible.
>
> Plaintiff's Objections at p. 7.

Under Plaintiff's theory, Plaintiff does not have to prove that a particular Defendant is responsible for any particular event or any particular damage, so Plaintiff chooses not to answer what facts (if any) it knows.

Plaintiff does not get to withhold facts, if it knows them, because those facts do not comport with Plaintiff's theory of the case. If and when the time comes, Plaintiff will be free to argue that information about how much P or N is attributable to growers under contract with a particular Defendant is inadmissible for whatever reasons it may construct. But, a party cannot pick and choose what facts to disclose in discovery depending on whether those facts hurt or help its legal theories.[2]

[2] The purpose of discovery is to force a litigant to disclose relevant material in its files so that its opponent can press a case, using whatever legal or factual theory the opponent sees fit to use. *Pro-Football, Inc. v. Harjo*, 191 F. Supp.2d 77 (D. D.C 2002)

As with all the interrogatories, the correct answer may be Plaintiff has no idea what the answer is. If that is the case, Simmons is entitled to that response. If Plaintiff has arrived at some figure it contends (and for purposes of the question Simmons does not care how Plaintiff got to that figure), then Simmons is entitled to that information. If the figure later changes for whatever reason, Plaintiff should supplement its response with the new information.

After objecting and refusing to answer, Plaintiff purports to give an answer, but it is another non-answer. Plaintiff states: "Subject to and without waiving its general and specific objections, the State of Oklahoma states that Defendant Simmons and/or persons, activities or entities for which Defendant Simmons is legally responsible have contributed P and N loading to Lake Tenkiller during the indicated period." This "answer" is not responsive to the question. It is, instead, just a restatement of Plaintiff's position taken in the Complaint. Getting behind the bare allegations, to discover what, if anything, supported the allegations, is the purpose of discovery in general and Simmons' in particular. The response is no response at all.

After purporting to answer, Plaintiff adds another objection, that to the extent any information which might answer the interrogatory is in the public domain, it is accessible to all Defendants and therefore Plaintiff should not have to answer. Plaintiff is arguing (i) the information is a closely guarded secret known only to Plaintiff's experts and counsel, (ii) Plaintiff does not have to disclose the information because it conflicts with Plaintiff's legal theory, and (iii) the information may be in the public domain so Plaintiff does not have to answer. This series of contradictory objections and positions gives a good indication of the thoughtfulness of Plaintiff's refusal to answer.

Interrogatory No. 4

Interrogatory No. 4 refers back to what should have been the straightforward factual answers to the first two interrogatories. It asks: "For each of your answers to Interrogatory Numbers One and Two, tell us how you know. Be complete." By way of response, Plaintiff simply refers back to the objections to Interrogatory Numbers One and Two.

The first two interrogatories asked for straightforward factual information--how much of particular chemical loading from litter does Plaintiff contend occurred in particular time periods. This interrogatory just asked for the factual basis for the figures.

Simmons has been sued for millions of dollars by Plaintiff on the theory Simmons is responsible for water degradation caused by the application of fertilizer by people with whom Simmons contracts. Plaintiff refuses to tell Simmons how much chemical loading it contends occurred or that it does not know, the two possible answers to the interrogatories. Just as Simmons is entitled to the basic factual information, Simmons is also entitled to know the basis for the figures.

If the true answers to the first two interrogatories are "Plaintiff does not know," answering Interrogatory No. 4 would be pretty simple. If Plaintiff does have some figure in mind based on its supposedly exhaustive investigation before suing Simmons, then Simmons is entitled to know how Plaintiff came to that figure.

Interrogatory No. 5

Interrogatory No. 5 explores Plaintiff's contention that Defendants have created a dangerous condition. It asks: "Provide the name, address and telephone number of all persons who have suffered any adverse health effects as a result of water contact in the

Illinois River Watershed which was caused by the land application of poultry litter." Not surprisingly by now, Plaintiff objects that the identity of people harmed by water contact is privileged or secret attorney work product.

The State also objected that the question was ambiguous, but never contacted Simmons before the answers were due to discuss what information Simmons was looking for, or how the request should be interpreted. If the State had gone to the trouble to ask, Simmons would have explained the term is intended to include any sort of health problems the State has decided to attribute to the land application of poultry litter. After stating these objections, the State answered that:

> health risks from the improper and concentrated release and disposal of poultry waste in the IRW include, but are not limited to, infection by bacteria or other pathogens, presence of trihalomethanes in drinking water, with the potential for formation of more, nitrate pollution of groundwater, toxic blue-green algae, and the effects of arsenic and other heavy metals. The State is currently investigating reports of illness caused by the Defendants improper waste disposal activities.

Simmons was not asking for a regurgitation of the State's allegations. Simmons was asking for the identities of anyone the State knows about who it says was sickened by contact with water supposedly tainted by the conduct of which the State is complaining. If the State is investigating reports of illness, and has some to report, that is what the interrogatory asks about. The State should answer with any information it has. If the investigations have not turned up a single person experiencing adverse health effects, then Simmons is entitled to that answer as well.

Request For Production No. 1.

Simmons' only request for production of documents asked for copies of all studies, datasets, articles and any other documents that support the State's answers to the

first four interrogatories about P and N loading. Since the State refused to answer any of those interrogatories and refused to produce any responsive documents, the only follow-up by the State was the June 30 letter with a list of websites which "might" contain responsive information.

If the State has answers to the straightforward, factual questions about the amounts of P and N loading, and how much the State attributes to growers under contract with Simmons, the State should answer. If the State has figures, then the State should produce whatever documents it is relying on to get to those figures. If the State does not know the answers to the first four interrogatories, it should just say so and that would resolve the request for production.

The State Cannot Shield Facts From Discovery Through Privilege Or Work Product Claims

Facts Are Not Protected By Privilege Or Work Product

Simmons has not asked for the opinions of any expert witnesses upon which the State intends to rely. Nor has Simmons asked for the secret theories or legal strategy of the State's lawyers. Nor has Simmons asked for what the State's lawyers have been saying about the claims. The interrogatories ask for **factual information**--the amounts of P and N loading the State contends occurred and the identities of anyone the State says was sickened by water contact. The State either has numbers or it does not. The State either has a list of people it claims were sickened by water contact or it does not.

The federal courts and commentators are clear. Facts are not privileged. Facts are not shielded by work product theories. *See Feldman v. Pioneer Petroleum, Inc.*, 87 FRD 86, 89 (W.D. Okla. 1980), which cited the *Wright & Miller* text on federal practice

and procedure for this basic concept; *Resolution Trust Corp. v. Dabney*, 73 F.3d 262 (10th Cir. 1995).

A tour of the legal literature reveals federal courts have been forced to make this point repeatedly in a number of contexts. Sometimes parties have attempted to block deposition questions about the *facts* on work product or privilege grounds. Sometimes, like here, parties have attempted to block discovery of facts through written questions.

Facts are discoverable and are not privileged. *Sedco International, S.A. v. Cory, 683 F.2d 1201* (8th Cir. 1982); cert. denied 459 U.S. 1017. Work product doctrine and attorney-client privilege do not protect disclosure of facts to opposing counsel. *Dunn v. State Farm Fire & Cas. Co.*, 122 FRD 507 (N.D. Miss. 1988). Work product privilege does not apply to underlying facts which can be explored. *In re Alexander Grant & Co. Litigation*, 110 FRD 545 (S.D. Fla 1986). Unless a question specifically inquires into an attorney's mental impressions, conclusions, opinions or legal theories, it is inappropriate to raise the objection of work product. *Starlight Intern. Inc v. Herlihy*, 186 FRD 626 (D. Kansas 1999). Work product furnishes no shield against discovery by interrogatories or by depositions of the facts that adverse party has learned or the persons from whom such facts were learned. *Eoppolo v. National RR Passenger Corp.*, 108 FRD 292 (E.D. Pa. 1985).

Since the work product rule by its terms applies to tangible items, some courts have questioned whether a work product objection can even apply in the context of interrogatories for example. *See for example ERA Franchise Systems, Inc. v. Northern Ins. Co. of New York*, 183 FRD 276 (D. Kansas 1998) (unless an interrogatory specifically asks for the content of a document protectable as work product, it is

inappropriate to raise an objection of work product against an interrogatory, which includes no request for production of documents); *In re Savitt/Adler Litigation*, 176 FRD 44 (N.D. N.Y. 1997) (since they sought facts, not documents or tangible objects, answers to interrogatories directing plaintiffs to state facts supporting their contentions about defendants were not subject to protection under work product doctrine; the proper response was a narrative answer).

The interrogatories are also not objectionable because they seek to flush out Plaintiff's position on factual matters and the bases for those positions. A party's contentions and opinions are discoverable by interrogatory. *Banks v. Office of Senate Sergeant-at-Arms*, 222 FRD 7 (D. D.C. 2004). Contention interrogatories are interrogatories that seek to clarify the basis for or scope of an adversary's legal claims. They are generally considered a perfectly permissible form of discovery. *Starcher v. Correctional Medical Systems, Inc.*, 144 F.3d 418 (6th Cir. 1998); *rehearing and suggestion for rehearing denied, cert. granted in part Cunningham v. Hamilton County, Ohio*, 525 U.S. 1098, *affirmed* 527 U.S. 198. The purpose of contention interrogatories is to narrow and define issues for trial and to enable the propounding party to determine the proof required to rebut the respondent's position. An interrogatory may reasonably ask for the material or principal facts which support a party's contentions in the case. *Steil v. Humana Kansas City, Inc.*, 197 FRD 445 (D. Kansas 2000). This is precisely what Simmons did in Interrogatory No. 4, which asked: ""For each of your answers to Interrogatory Numbers One and Two, tell us how you know. Be complete."

Some of the cases in which similar situations have arisen make the point. *See Security Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 FRD 29 (D. Conn. 2003)

(Attorney client privilege and work product doctrine did not preclude deposition questions asking corporate representative the factual bases of corporation's allegations, or production of documents relied on by corporate representative to provide such facts. Attorney client privilege did not protect underlying information, and work product protection did not extent to facts within work product documents).

Interrogatories as to whether a party took a certain position and if so the factual basis for that position, were discoverable and didn't delve into purely legal issues. Interrogatories aren't objectionable solely because they inquire into a party's position on a particular issue. *Schaap v. Executive Industries, Inc*., 130 FRD 384 (N.D. Ill. 1990). A plaintiff is required to answer interrogatories calling for its opinion or contentions, unless the plaintiff in good faith has formed no definite opinion about the matter and could not form such an opinion without unwarranted speculation—if that were the case, that should be the answer. *Stabilus, a Division of Fichtel & Sachs Industries, Inc. v. Haynsworth, Baldwin, Johnson and Greaves, P.A.*, 144 FRD 258 (E.D. Pa. 1992). The work product rule does not apply to an interrogatory inquiring about the facts that formed the basis for the government's lawsuit. *U.S. v. Dentsply Intern. Inc*., 187 FRD 152 (D. Del. 1996). *See also U.S. ex rel O'Keefe v. McDonnell Douglas Corp*., 961 F. Supp. 1288 (E.D. Mo. 1997), *affirmed* 132 F.3d 1252 (8th Cir. 1998) (defendant was entitled to inquire into factual bases of government allegations; questions concerning when government discovered certain matters were not covered by work product doctrine).

Plaintiff Has Waived Any Protection Which Might Ever Have Applied

It is clear Simmons is entitled to inquire about the facts in Plaintiff's possession and those facts are not subject to any attorney client privilege or work product protection.

Even if the facts Simmons is inquiring about had at one time been the subject of some privilege or work product protection, Plaintiff made that information fair game by suing Simmons and relying on it. *Sinclair Oil Corp. v. Texaco, Inc.*, 208 FRD 329, 335 (N.D. Okla. 2002) laid out three factors that are applied to determine whether a party has waived some otherwise applicable privilege:

1. Whether the assertion of the privilege is the result of some affirmative act, such as filing suit or asserting an affirmative defense;
2. Whether the asserting party, through the affirmative act, put the protected information at issue by making it relevant to the case; or
3. If the privilege was applied, would it deny the opposing party access to information that was vital to the opposing party's defense.

Here, Plaintiff has sued Simmons and other Defendants alleging (among other things) they are responsible for P and N loading of Lake Tenkiller from the land application of poultry litter. In getting permission from the Court to come onto people's property and conduct sampling activities, Plaintiff represented it had already performed investigations and concluded poultry litter had resulted in contaminants in the watershed. Simmons is asking the State, for a subset of the issues, what figures it is using and how the State came to those figures. The third factor, whether a privilege would deny the opposing party access to information vital to the defense, is clear. The State cannot sue Simmons for large sums for allegedly bad conduct, while simultaneously hiding what it knows.

Simmons Has Substantial Need Of The Information

The Federal Rules of Civil Procedure recognize that, even if material were subject to some work product protection which had not been waived, a party can still obtain it upon substantial need and the inability to obtain substantially equivalent information without undue hardship. *See* FRCP 26(b)(3). In this instance, only Plaintiff knows how much P or N loading it contends occurred in the period that is the subject of the discovery requests. Only Plaintiff knows how much of that loading it contends came from growers under contract with Simmons. And only Plaintiff knows who it contends has been made ill by exposure to the water. There is no way for Simmons to obtain that information except through Plaintiff's answering the questions and producing the documents.

Plaintiff wants to sue Simmons and the other Defendants for allegedly degrading the watershed from the land application of chicken litter by third parties. But, Plaintiff refuses to tell Simmons its position on how much chemical loading has occurred, or on what it bases that position. Plaintiff wishes to withhold that basic factual information until much later in the case, mentioning 90 days before trial, on the theory this factual information will be the subject of testifying expert reports.

When the time comes to disclose testifying expert witnesses and exchange reports, Simmons will certainly review those reports and test the opinions expressed. But, Plaintiff does not get to hide the facts upon which it purports to base the lawsuit until expert witnesses are ready to testify. Simmons did not ask Plaintiff what various witnesses will say. Simmons just asked for the facts.

Plaintiff Cannot Refuse To Answer Based On Unidentified Business Records

Plaintiff refused to answer the interrogatories, among other reasons, because the answers might be in business records already produced or eventually to be produced. This approach is a perversion of FRCP 33(d). The Rule allows a party to refer to records instead of just answering an interrogatory in a special situation. Where an answer may be obtained by examination of business records, and the burden is the same on either party, the responding party can specify the records where the answer is contained and make those records available. "A specification shall be in sufficient detail to permit the interrogating party to locate and identify as readily as can the party served, the records from which the answer may be ascertained." An answer saying the information may be in some unspecified materials already produced, or in unspecified materials which may be produced in the future, does not satisfy Rule 33.

A party that elects to avail itself of the option of answering interrogatories by specifying business records from which the answers may be obtained must specify where in the records the answers can be found. *Cambridge Electronics Corp. v. MGA Electronics, Inc., 227 FRD 313* (C.D. Cal. 2004). A party is not allowed to refer requesting parties to previously produced or identified documents in place of providing a written answer to an interrogatory where it does not identify the documents responsive to the particular interrogatory. *DIRECTTV, Inc. v. Puccinelli*, 224 FRD 677 (D. Kansas 2004). A party has to specify which of its documents answered the interrogatories, or indicate the exact records from which the answer could be derived. *In re G-I Holdings, Inc.*, 218 FRD 428 (D. N.J. 2003).

The Privilege Log And Documents On The Log Should Be Reviewed In Camera

Accompanying Plaintiff's discovery objections was a short privilege log. Some of the entries indicate communications authored by various state agencies. Simmons asked, but did not receive, an explanation of why documents authored by various state agencies, presumably in the ordinary course of their business, should be withheld as privileged or work product. Given the very expansive and doubtful approach to privilege taken by Plaintiff, Simmons requests the Court review *in camera* the materials being withheld to determine whether any protection applies.

The General Objections

Plaintiff listed ten "general objections" which were not tied to any of the actual requests and which do not enlighten the reader about how those objections might factor into responses to the actual requests. The general objections appear to contain a number of general limitations on discovery imposed unilaterally by Plaintiff, limitations which do not comport with the Federal Rules of Civil Procedure. Several of the general objections do not appear to have any discernible connection to the actual request. Because the general objections may factor in some unknown way into the nonresponses to all Simmons' discovery requests, Simmons will address those general objections briefly. The basic problem is that each of the general objections purports to create some limitation on the State's responses "to the extent" it considers a discovery request to trigger an objection. Since the State never informs Simmons about whether and to what extent it considers a particular request to trigger one of the general objections and thus a limitation on the answer, Simmons cannot discern the effect of the general objections.

The first general objection states that Plaintiff objects to the discovery requests "to the extent that they seek the discovery of information that is protected by the attorney-client privilege and/or the work product doctrine." Ordinarily, that objection would be raised in the event a particular request implicated material that is privileged or work product. Since Plaintiff later raises this objection with respect to each and every request, and refuses to produce any information at all, presumably Plaintiff considers all of each request to ask for material that is privileged or work product.

The second general objection objects to discovery requests "to the extent that they seek the discovery of information that is already in the possession of defendant, is obtainable from another source that is more convenient, less burdensome or less expensive, or is as accessible to defendant as it is to the State." The Federal Rules of Civil Procedure do not allow a party (particularly a plaintiff) to escape participation in discovery because the party thinks information is obtainable from another source that is more convenient. Simmons is unsure precisely how this type of unilateral, outside the rules restriction on discovery claimed by Plaintiff actually impacts Plaintiff's failure to answer any of the discovery requests.

The third general objection objects to discovery requests "to the extent that they are overly broad, oppressive, unduly burdensome and expensive to answer. Providing answers to such discovery requests would needlessly and improperly burden the State." This appears to be in part a restatement of the unilateral restriction earlier announced, that Plaintiff will simply refuse to produce any information it does not wish to.

The fourth general objection objects to each request "to the extent that they improperly seek identification of 'all' items or 'each' item of responsive information." In

the Simmons requests, "each" is only used to designate that information is requested for each specific year, or each interrogatory answer. "All" is only used when asking Plaintiff to identify which persons have suffered adverse health effects.

The fifth general objection objects to each request "to the extent that discovery sought is unreasonably cumulative or duplicative." Nowhere in the specific refusals to answer does Plaintiff cite to any cumulative or duplicative nature of any requests, so it is unclear how, if at all, this general objection connects to Plaintiff's refusal to answer.

The sixth general objection objects to each request "to the extent that they do not state with the required degree of specificity and particularity what information is being sought. As such, such discovery requests are vague, indefinite, ambiguous and not susceptible to any easily discernible meaning." Since Plaintiff does not make this specific objection to any of the specific requests it refused to answer, it is unclear whether this objection is meaningless boilerplate or some unspecified unilateral restriction on discovery.

The seventh general objection objects to the requests "to the extent that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, and the importance of the proposed discovery in resolving the issues." Plaintiff does not object to any specific request on this theory. It appears to be yet another attempt to impose private, unilateral restrictions on discovery in contravention of the Federal Rules of Civil Procedure.

The eighth general objection objects to the discovery requests "to the extent that they improperly attempt to impose obligations on the State other than those imposed or

authorized by the Federal Rules of Civil Procedure." Since Plaintiff does not object to any specific request on the theory that it oversteps the Federal Rules of Civil Procedure, it is unclear whether this objection is superfluous.

The ninth general objection objects to the requests "to the extent that they improperly attempt to alter the plain meaning of certain words." The objection does not specify which "certain words" or any instances in which Plaintiff contends Simmons is attempting to alter the plain meaning of words. In fact, the questions were consciously constructed using plain language, words that are easy to understand, words meaningful to a fourth grader.

The final general objection says that by submitting its responses, Plaintiff does not acknowledge the requested information is necessarily relevant or admissible. Since Plaintiff does not get to make those determinations, but has obligations to participate in discovery, this is something of a truism. In any event, Plaintiff refused to answer a single request.

Conclusion

Simmons has asked how much specific nutrient loading Plaintiff says occurred for particular years. Simmons has asked how much of that nutrient loading Plaintiff says resulted from growers under contract with Simmons. Simmons has asked how Plaintiff knows the amounts it contends. And Simmons has asked for the identities of people Plaintiff contends have suffered health problems caused by the poultry litter. None of that information is secret. None of that information can be secret. If an expert witness or consultant knows the figures, Simmons is entitled to them and Plaintiff should state them.

And, equally important, if Plaintiff does not know the figures, Simmons is entitled to that answer in black and white and verified.

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